Federalism and Trade Negotiations in Canada: CUSFTA, CETA and PTP compared

Abstract
According to the Canadian Constitution and jurisprudence, the federal government has full powers with respect to treaty-making and international trade responsibility. However, the provinces have become increasingly important players on trade issues. Trade negotiations increasingly affect areas under provincial jurisdiction and the federal government cannot impose treaties in these areas on the provinces. This article compares provincial involvement in three important negotiations: the Canada-United States Free Trade Agreement (FTA), the Canada-European Union Comprehensive Economic and Trade Agreement (CETA), and the Trans-Pacific Partnership (TPP).

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Keywords: Trade negotiation, federalism, Canadian provinces, CUSFTA, CETA, TPP
Provinces (and even Canadian territories) have become increasingly important players in Canadian trade negotiations (Kukucha 2016, 2013, 2008, 2005, Ouellet and Beaumier 2016, VanDuzer 2013, Fafard and Leblond 2013; Paquin 2014, 2013, 2010, 2006). Although the federal government holds, under the Constitution, full powers over the conclusion of treaties and has sole responsibility for international trade, Grace Skogstad has gone so far as to describe the process of trade negotiations as a "de facto shared jurisdiction " (Skogstad 2012: 204).

In practice, the provinces are not inactive participants in trade negotiations. Approximately 40% of the 750 international agreements concluded by the Quebec government (of which 386 are currently in force) have a direct or indirect link to trade, relating to areas such as economic development, agriculture, culture, natural resources, and public procurement (Ouellet and Beaumier 2016: 71). Significant agreements include the Intergovernmental Agreement on Government Procurement with the State of New York of 2001, the Quebec-France Agreement on the Mutual Recognition of Professional Qualifications of 2008, and the Agreement on the Creation of a Carbon Market with the State of California in 2013. These three agreements have a direct impact on trade (Ouellet and Beaumier 2016: 73).

There are two reasons for provincial involvement. First, at a constitutional level, although the federal government has responsibility for international trade and can negotiate in areas of exclusive provincial jurisdiction, it cannot compel the provinces to implement trade agreements ratified (Skogstad 2012, VanDuzer 2013, Kukucha 2013, 2008, Cyr 2009, Paquin 2013, 2010, 2006). Since treaties do not have a direct effect on domestic law, they must be implemented through a law of incorporation at either the federal or provincial level. Provincial action is essential. Second, commercial treaties, particularly those of the "next generation", increasingly involve areas of provincial jurisdiction, be it public procurement, labour mobility, public monopolies and state corporations, investment or sustainable development.

Negotiations with the European Union are of particular importance as they created a significant precedent. Indeed, for the first time in the history of Canadian trade negotiations, the provinces were represented in the Canadian delegation, and even participated directly in negotiations on several subjects (Kukucha 2016, 2013, Paquin 2013, VanDuzer 2013, Fafard and Leblond 2013). While the precedent is important, it does not represent a paradigm shift in the management of trade negotiations in Canada, nor does it indicate how future negotiations will proceed. The real sustainable change lies in the increasing institutionalization of intergovernmental mechanisms related to international trade negotiations. This phenomenon is also evident in other fields such as human rights and education (Paquin 2006).

In this article, we explain why provinces have become increasingly important players in Canada's trade negotiations. We begin by examining the evolution of treaty-making in Canada in general, which goes beyon trade issues. In the second part, we focus on the negotiation of three trade agreements: the Canada-United States Free Trade Agreement (CUSFTA), the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) and the Trans-Pacific Partnership (TPP). In conclusion, we argue that the increasing influence of the provinces in trade negotiations is not a radical change on the part of the Canadian government, but rather the logical continuation of an evolution in trade negotiations that began in the 1970s.
I - Federalism and international negotiations

The treaty-making process in Canada, when it affects provincial jurisdictions, involves two basic steps that are not necessarily sequential: the conclusion of a treaty (i.e. negotiation, signature and ratification) and its implementation. The federal executive has a monopoly on the first step (a monopoly contested by the Ontario government in 1936 and the Quebec government since the 1965 Gérin-Lajoie doctrine), while the second step of adopting the legislative measures required to implement a treaty falls to the legislature at either federal or provincial level. In Canada, there is a need for legislative intervention at the appropriate level to incorporate treaties into domestic law (De Mestral and Fox-Decent 2008).

At the federal level, an executive order (an instrument of full powers that designates the person or persons vested with the power to sign the treaty on behalf of Canada) is first required before the signature. A second decree is then necessary before ratification (a decree prepared by Cabinet authorizing the Minister of Foreign Affairs to sign an instrument of ratification or accession). Certain multilateral treaties, however, only require a decree for ratification. After it is signed, the treaty is tabled in Federal Parliament for a period of 21 days (Article 6.2a of the Policy on Tabling of Treaties in Parliament), unless it is considered an emergency (Article 6.3 of the Policy on Tabling of Treaties in Parliament). Once this delay has passed, legislation for implementation at the federal level can be passed. Ratification, which is an executive act, requires a second decree. The Directorate of Treaty Law publishes the Canada Treaty Series, which offers an updated list of treaties in Canada.

As regards the second step, for a treaty to be implemented, it must generally be incorporated into domestic law by a law of incorporation at the competent level (Barnett 2012; Scherrer 2000). If national law is compatible with the treaty, there is no need for new legislation. This is often the case, as the provinces and the federal government have frequently already enacted laws stricter than some international standards. When domestic law is incompatible with the treaty, an implementing law is necessary and can take various forms, ranging from a legislative text appended to the treaty that gives it the force of law, to a distinct law that more or less faithfully reproduces the provisions of the treaty. De Mestral and Fox-Decent have identified more than 13 ways to integrate treaties into domestic law at the federal level (De Mestral and Fox-Decent 2008: 617-622). In Canada, a treaty does not automatically supersede existing laws. Judges rely on Canadian laws and not on treaties to render judgments, although some judgments refer to pertinent treaties. This is a sizeable challenge in Canada because "roughly 40 per cent of federal statutes implement international rules in whole or in part" (De Mestral and Fox-Decent 2008: 578).

In the case of a treaty dealing with Quebec jurisdictions (Quebec differs from other provinces where procedures are simpler and an executive decree is generally sufficient), the Parliament of Quebec must approve the treaty before government gives its assent. This step is not necessary at the federal level or in the other provinces. Thus, the Quebec Parliament is the only one in Canada to intervene in the approval of treaties.
The Act respecting the Ministère des Relations internationales has, since 2002, involved the legislature in the process of approving major international commitments by the Government of Quebec. When an international commitment is described as "important", meaning it requires the adoption of a law, the creation of a regulation, the imposition of a tax or government acceptance of a financial obligation, or concerns human rights or international trade, it must be approved by Parliament (LeDuc, 2009: 550-551). Daniel Turp (2016) has identified 27 treaties concluded since 2002 by the federal government that were considered "important" and were therefore tabled for approval by the National Assembly of Quebec. Thus, Quebec goes further than Canada, since federal Parliament does not have to approve a treaty, although it must, as in Quebec, adopt legislation to assure its implementation.

In Quebec, the Minister of International Relations deposits the treaty, along with explanatory notes on its effects, with the National Assembly. The minister can introduce a motion for approval or rejection (there are two precedents for rejection), and debate must last two hours. In an emergency, the government may "ratify", in the words of the Government of Quebec, an agreement or approve a treaty before it is tabled in the National Assembly (LeDuc, 2009: 550-551). Precedents include the Softwood Lumber Agreement between Canada and the United States (Turp 2016: 23).

It should be noted that the debate and the vote in Parliament occur after the Government of Canada has signed the treaty. Québec parliamentarians therefore have few means to influence the content of the treaty at this stage: they can only adopt or reject it (Turp 2016: 24-25). That said, there is nothing to prevent members from sending their federal counterparts signals on the mood of Quebec parliamentarians during the negotiations. During CETA negotiations, parliamentarians invited Pierre Marc Johnson, chief negotiator for Quebec, to a parliamentary commission. This mechanism enabled parliamentarians to raise their concerns. In the vast majority of cases, however, the vote to approve is unanimous.

In the event that the Quebec Parliament refuses to give its approval, the executive could argue that the treaty is urgent and pass a decree. However, it would be difficult to pass implementing legislation in this context. Thus, unlike Wallonia that was able, for a time, to block the signature of the CETA, Quebec's only recourse is to refuse to implement a treaty in its areas of jurisdiction. This situation is incongruous since it is the federal government that would need to defend the position of the Quebec government in the event of a denunciation. As Richard Ouellet and Guillaume Beaumier write:

... in the event that Quebec decides not to approve and thereby fails to comply with an international agreement ratified by Canada, the federal government would have to defend itself before a panel or Appellate Body of the World Trade Organization (WTO), an arbitration tribunal or any other International Court competent to judge the matter. Such an eventuality is not merely theoretical since Canada has already had to defend several measures taken by different provinces. For example, from 2010 to 2013, Canada has had to defend the Green Energy Program in Ontario before the dispute settlement body of the WTO after a complaint by Japan and the European...
Similarly, it is not uncommon for an investor to attack a provincial measure. In the recent past, NAFTA investors filed two complaints regarding measures adopted by Ontario and Quebec. These complaints specifically related to Ontario's Green Energy Program, which had already been successfully challenged at the WTO, and to the moratorium imposed by Quebec on shale gas development. (my translation of Ouellet and Beaumier, 2016: 76)

There are precedents for Canada having to compensate companies because of measures taken by the provinces. For example, due to measures taken by Newfoundland and Labrador, the Government of Canada had to pay AbitibiBowater (CAN) $130 million (Lévesque 2015). As a result of this incident, the Prime Minister of Canada asked the federal Department of Foreign Affairs to find a mechanism that would make provinces responsible for their own actions (Côté 2015). A majority of provinces are opposed to this idea, although the Government of Quebec is in favor.

This situation has created many problems. According to De Mestral and Fox-Decent "From the federal perspective there are many frustrations and pitfalls. The federal government can commit Canada to a treaty, but it cannot guarantee that the treaty will be properly implemented if the subject matter falls within provincial jurisdiction. This fact can be a serious impediment to the rapid consolidation of a treaty relationship with other states." (De Mestral and Fox-Decent 2008: 644). Given these difficulties, the federal government must be careful when it commits Canada on the international stage, because it risks being undermined by provincial actions. Various strategies have been used historically to avoid such a situation. The first is to limit international negotiations to areas of federal competence. During negotiation of the Canada-Colombia Free Trade Agreement with Peru, the Government of Canada excluded from these treaties all provincial measures that predated the conclusion of the Canada-Colombia agreement in areas of services and investment (VanDuzer 2013). Another strategy is to use federal clauses to limit the scope of international treaties, and yet another is to create intergovernmental mechanisms for trade negotiations that enable provinces to collaborate in the negotiating process.

A - Federal clauses

Since the Government of Canada does not have the power to impose treaties it ratifies in areas of provincial jurisdiction, it has been forced to use different mechanisms in order to make sure that its treaties will not be denounced. Federalism and the rights of the provinces in international relations have an important bearing on the conclusion of treaties in Canada. The Canadian problem is even more striking when it comes to Canada's involvement in the work of international organizations in areas that fall under provincial jurisdiction, such as UNESCO, the World Health Organization, and the International Labour Organization (Patry 2003: 6; Paquin 2006).

In order to avoid problems, the federal government has used in the past different strategies. It undertook the entire process to arrive at the signing of a convention or treaty in an international organization but inserted a federal clause in the final treaty. The federal clause (sometimes referred to as the Canada clause) subjects the implementation of the treaty to
constitutional imperatives and states that the federal government can only respect the treaty to the extent of its constitutional jurisdiction. The first federal clause of the International Labour Organization of 1946 states: “In the case of a federal State, the power of which to enter into conventions on labour matters is subject to limitations, it shall be in the discretion of that Government to treat a draft convention to which such limitations apply as a recommendation only, and the provisions of this Article with respect to recommendations shall apply in such case» (ILO, 1946 :226; see also : Dehousse 1991: 187). Federal clauses are also used in Canada's bilateral treaties. The double taxation agreement between Canada and Australia of 1957, for example, contains a federal clause.

However, federal clauses have proven unacceptable to countries with which Canada enters into agreements. Indeed, when Canada ratifies a convention with a unitary state like France, it is bound to respect the entire treaty, despite the fact that the Canadian federal government can only ensure respect for the treaty in areas under its jurisdiction. The federal clause is unacceptable to unitary countries, as its wording is neither binding nor does it contain any obligation regarding means. Moreover, in some cases, countries, particularly the United States, used federal clauses even though they had the constitutional capacity to impose the treaty on States. The clause is thus contested and some authors went so far as to advance, back in the 1970s, that federal clauses are "an idea whose time has passed" (Patry 2003: 33).

In practice, however, it is difficult not to resort to such clauses, because the limitations faced by countries like Canada are very real. Without a federal clause, Canada risks marginalization because it would not be able to participate in activities of international organizations that touch on provincial jurisdictions. The federal clause therefore persisted and evolved in two ways: the first involved limiting the scope of an international convention to certain provinces, and the second required the federal government to take reasonable steps to ensure that provinces enforced the agreement. In this way, federal clauses began to impose certain obligations on the federal government.

An example of the first evolution comes from the Hague Conference on Private International Law, an international organization. Under the conventions adopted by the Conference, the Canadian government supported a provision that allowed federal states to limit the territorial scope of ratification. The federal government could thus limit the scope of the agreement to only a few provinces. The advantage of this practice is that it circumvents the rule of unanimity. Upon ratification of its accession to the Convention on the Uniform Law on the Form of an International Will of 1973, the federal government indicated that this Convention applied only to Manitoba and Newfoundland and Labrador. A few months later, the scope of the Convention was extended to Ontario and Alberta. In another example, the federal government supported the 1980 Hague Convention on the Civil Aspects of International Child Abduction. When the Convention was ratified in 1983, it applied to only four provinces. It was gradually extended to other provinces and is now in force across the country.

The second evolution of the federal clause stems from treaties such as the General Agreement on Tariffs and Trade (GATT) or, more recently, the North American Free Trade Agreement (NAFTA). According to Article XXIV: 12 (13) of the GATT text: "Each Member is fully responsible under the GATT 1994 for complying with all provisions of the GATT 1994 and shall take all reasonable steps within its power to ensure that, in its territory, regional and local
governments and authorities shall observe the said provisions." This clause obliges signatory countries to adopt "reasonable steps" to ensure that regional and local governments apply the GATT 1994 treaty. The nature of Canada's federal government obligations to the provinces was clarified by the Dispute Settlement Body of the organization. In *Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, the United States argued that the Canadian government could force the provinces to adopt GATT regulations. The provinces were in fact breaking certain commitments made by Canada. The GATT panel's report did not define what it means for the federal government to take "reasonable steps", but found that the Canadian government must be able to demonstrate "that it had made serious, persistent and convincing efforts". In short, the GATT experts, and today the WTO, recognize that the federal government does not have the constitutional authority to impose its treaties on the provinces. This reservation is reflected in the text of Article 105 of NAFTA on the scope of obligations. Like Article XXIV: 12 (13) of the GATT text, this Article states: "The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments."

The federal government became increasingly aware of its limitations and, through the 1970s and 1980s, developed a number of consultation mechanisms between federal and provincial governments, today known as the C-Commerce Forums (Kukucha 2016; Paquin 2006).

**II - Negotiation and Relations Between Federal and Provincial Governments**

In theory, a typical trade negotiation in Canada is led by the federal government, even when it deals with an area that falls under exclusively provincial jurisdiction. However, there are many precedents where provincial governments have participated in discussions, including the Government of Quebec. In almost every case, intergovernmental negotiations between senior officials and sometimes between ministers will take place. De Mestral and Fox-Decent therefore conclude that "[...] the policy-formation process relating to treaty negotiation is entirely in the hands of the federal public service, subject to political direction from the federal cabinet and other elected members of the federal government. In formal terms, provincial, territorial, and First Nations governments are not part of this process. They can be invited to participate, but the invitation is entirely subject to the discretion of the federal government and public service." (De Mestral and Fox-Decent 2008: 592).

Changes to the federal clauses forced the federal government to consult the provinces when international treaties touched on their jurisdictions. Aware of its limitations, the federal government set up mechanisms for consultation with the provinces (Zeigel 1988, Turp 2002, Paquin 2006).

In Canada, there is no comprehensive framework agreement for federal-provincial consultations related to international negotiations, and there is very little consistency in approaches (VanDuzer 2013, Paquin 2006; Mestral 2005). Agreements on education, private international law or human rights are more institutionalized than those on the environment or on trade, but on the whole they do not cover all international treaties that fall within the jurisdiction
of the provinces. Rather, they are federal-provincial sectoral agreements. In other words, the mechanisms do not cover all the international negotiations that affect the areas of jurisdiction of the provinces. Moreover, they are weakly institutionalized, hardly binding on the federal government, and leave much room for federal arbitrariness. As Renaud Dehousse pointed out in 1991: "Generally [Ottawa] tends to downplay the importance of the consultation process by presenting it as an initiative dictated by practical considerations rather than by legal requirements" (Dehousse 1991: 136-137). As well, these mechanisms almost never include provincial participation in the negotiations themselves, and provincial officials regularly complain about the difficulty of accessing information.

According to the Canadian government, the ratification of an international treaty strictly concerns the federal executive. This body can commit Canada to agreements on the international stage without any form of provincial consent, even if a treaty requires substantial changes in laws and regulations at all levels. In order to avoid foreseeable objections, some authors claim that the federal government does not ratify international treaties requiring provincial legislative changes before the provinces have approved these legislative amendments. Thus, according to De Mestral and Fox-Decent “Generally, the federal government will not ratify a treaty until it is confident that Canada's domestic law is consistent with the treaty and that there are sufficient legal powers in place to comply with its obligations. If legislation is necessary, it is usually passed before the treaty is ratified. The same considerations apply when a treaty relates to matters falling within both federal and provincial jurisdiction, and a fortiori when the treaty relates to matters exclusively within provincial jurisdiction" (De Mestral and Fox-Decent 2008: 624).

In fact, a detailed examination of the steps leading to the conclusion of a treaty shows that the process can be relatively long and is often not completed by the time Canada ratifies the treaty (Turp 2016, Paquin 2010). The parallel agreements to NAFTA provide good examples. These agreements relate, on the one hand, to labour, which is an exclusively provincial competency and, on the other hand, to the environment, which is a sphere of shared jurisdiction. Most provinces wished to participate in the negotiation of these side agreements, while the federal government preferred to act alone. In the end, the Government of Canada included a specific clause in these side agreements that allows provinces to withdraw (Kukucha 2003). Only three provinces signed the environmental agreement: Alberta in 1995, Quebec in 1996, and Manitoba in 1997 (Government of Canada, 2002). The agreement on labour has been signed by four provinces: Alberta in 1995, Quebec and Manitoba in 1996 and Prince Edward Island in 1998.

Parallel agreements are not exceptions to the rule. Looking at the Canada-Costa Rica Free Trade Agreement, we see that Canada signed the treaty on April 23, 2001, the Implementation Act was passed on September 20, 2001, and the Agreement received Royal Assent on December 18, 2001. The National Assembly of Quebec only approved the treaty on June 2, 2004, over a year after it came into effect on November 1, 2002. A similar situation arose with the Canada-Chile Free Trade Agreement. The Government of Canada signed the Agreement on December 5, 1996 and the House of Commons passed the Implementation Act on July 5, 1997. The treaty was only approved on June 3, 2004, seven years after its entry into force. This situation is not exclusive to trade agreements (see the summary table in Turp 2016).
III - The conclusion of treaties and the practice of trade negotiations

After the Second World War, Canada's trade policy was essentially structured around its participation in the GATT negotiations. Prior to the 1970s, negotiations focused on matters that were exclusively federal, including tariff reduction (Kukucha, 2016: 2). With the Kennedy Round (1964-1967), and even more clearly with the Tokyo Round (1973-1979), multilateral trade negotiations began to have an increasing impact on provincial jurisdictions, notably on non-tariff trade barriers. It was in this context that the Canadian government introduced consultative mechanisms on federal initiatives that affected international trade. As later cycles also involved areas of provincial jurisdiction, these consultation mechanisms were maintained (Whinham 1978-1979). With the Uruguay Round, for example, GATT discussions addressed issues such as subsidies, dumping, phytosanitary measures, but also agriculture, intellectual property and services.

Initially, federal-provincial consultations on Canada's trade negotiations in the GATT took place within the Canadian Committee on Tariffs and Trade. A few years later, this institution was replaced by the Canadian Coordinator of Trade Negotiations (Kukucha, 2016). During this phase of negotiations, Ottawa was concerned about GATT implementation in provincial jurisdictions. Indeed, in the 1980s, the European Community and the United States opposed practices around the sale and distribution of alcohol, notably beer, by the Government of Ontario.

These consultations have gained importance as international negotiations focus increasingly on internal policies, including business grants and provincial or local regulations, which distort or obstruct international trade. Policies on the pricing of natural resources and support for agriculture are just two examples of issues falling under the constitutional jurisdiction of the provinces that are beginning to be addressed at international economic conferences. In 1980, this *modus operandi* was institutionalized through the creation of periodic federal-provincial consultations on trade policy (1978-1979 Whinham: 64-89).

IV - The Canada-United States Free Trade Agreement

During Canada-US Free Trade Agreement negotiations in the 1980s and NAFTA in the early 1990s, the provinces were actively involved in discussions around the potential impact of these agreements on their economies and jurisdictions. The Canada-US Free Trade Agreement and then NAFTA include areas important to provinces such as rules of origin, technical standards, sanitary and phytosanitary standards, energy, financial services and certification.

When Brian Mulroney's Progressive Conservative government began discussions on free trade in 1985, the provinces were not formally consulted at the stage of defining the mandate, nor for the selection of the chief negotiator or the heads of negotiating tables. Nevertheless, the provinces were able to make their positions known, not just at Prime Ministers conferences, but also by sending representatives to the preparatory committee for trade negotiations launched by Canada's chief negotiator. During the negotiation of the CUSFTA, the premiers of the provinces met with the Prime Minister of Canada 14 times in 18 months at federal-provincial meetings (Doern and Tomlin 1991, 126-151).
In order to make their positions clear and increase their influence in negotiations, Quebec and Ontario retained the services of advisors with experience in this type of exercise. The Ontario government hired Bob Latimer, a former federal official with the Ministry of Foreign Affairs and International Trade, while the Quebec government recruited Jake Warren, who served as Canadian negotiator during the Tokyo Round (Hart et al. 1994: 139). However, when the premiers sought to invite themselves to the negotiating table alongside Canada and the United States, the Mulroney government objected.

An intergovernmental mechanism, the Committee on Trade Negotiations, was established to manage relations between the provinces and the federal government during this important negotiation. The 10 provinces were represented on the committee. The Canadian government also set up consultative committees on specific issues to be discussed with the provinces, and then systematized meetings with the provinces to seek technical advice and prepare arguments for the negotiation.

NAFTA negotiations saw the establishment of another forum: the Committee for North American Trade Negotiations. This forum enabled the provinces to read negotiation documents and obtain information on specific issues (Abelson and Lusztig, 1996: 681-698).

These intergovernmental negotiation practices have been perpetuated through the C-Trade Committee (C-Trade meeting). Federal, provincial and territorial officials meet quarterly to share information and define Canada's position on a range of issues related to trade policy, including trade negotiations.

During negotiations of the NAFTA parallel agreements, which were imposed by the US government following Bill Clinton's election, provincial participation increased as these agreements dealt with environmental and labour issues, which fall under provincial jurisdiction. The provinces were privy to the strategic positions of Mexico and the US, and participated in drafting Canadian positions. Provincial representatives were invited to a meeting in Washington in August 1993 for the final stage of negotiations. Six provinces, including Quebec and Alberta, were represented during the entire period (Kukucha 2016, 2008: 182-184).

V - The Comprehensive Economic and Trade Agreement

In May 2009, the European Union and the Canadian government announced the launch of trade negotiations to conclude a next-generation free trade agreement, and decided, for the first time in Canadian history, that the provinces would be represented on the negotiating team (Kukucha 2013 VanDuzer 2013).

Provincial participation in CETA trade negotiations stemmed from a European Union requirement and was a condition for launching negotiations. Based on the failure of prior negotiations, the European Union considered that provincial representatives needed to be present for negotiations to have a chance at success. This stipulation was prompted by European Union interest in public procurement, an area that falls under provincial jurisdiction, an area not covered in commercial treaties or by the Agreement on Government Procurement WTO.

Compared to previous negotiations on trade liberalization, including with the United States, the provinces saw their role increased at virtually all stages of negotiations. Although they
were not consulted about the selection of the chief negotiator, Steve Verheul, they were involved in the critical stages of drafting the joint report and formulating the negotiating mandate. During preparation, the provinces were also consulted about issues related to their fields of expertise. In addition, they had access to the negotiation documents and were extensively consulted throughout the negotiations. Quebec, for example, presented over 150 position papers or strategic position briefs. In addition, more than 275 meetings between federal negotiators and their provincial and territorial counterparts, many meetings involving provinces and territories with common interests, and bilateral meetings in camera between a province or territory and federal negotiators were held (Johnson, Muzzi and Bastien 2015: 30).

The provinces, however, did not have access to all negotiating areas (see Table 1). They participated actively in discussions on technical barriers to trade, regulatory cooperation, investment, including investor-State dispute settlement mechanisms, cross-border trade in services, mutual recognition of professional qualifications, public procurement, public monopolies and state corporations, sustainable development (labour and environment), wine and spirits, and cooperation (raw materials and innovation, and research in science and technology). However, they were largely excluded from discussions related to agriculture, customs procedures and trade facilitation (rules of origin and procedures of origin), sanitary and phytosanitary measures, trade remedies, subsidies, issues relating to maritime transport and temporary records, financial services, telecommunications, electronic commerce, intellectual property (geographical and patents names), competition policy, institutional issues, and bilateral cooperation on biotechnology (Paquin 2013).

**Table 1: Distribution of subjects of negotiation between federal and provincial governments in CETA**

<table>
<thead>
<tr>
<th>Federal</th>
<th>Provinces</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trade in goods (agricultural and non-agricultural)</td>
<td>Trade in services</td>
</tr>
<tr>
<td>Sanitary and Phytosanitary measures</td>
<td>Technical trade barriers</td>
</tr>
<tr>
<td>Customs procedures and trade facilitation</td>
<td>Labour mobility</td>
</tr>
<tr>
<td>Intellectual property and geographical names</td>
<td>Investment and investor-State dispute settlement mechanisms</td>
</tr>
<tr>
<td>Institutional arrangements</td>
<td>Public procurement</td>
</tr>
</tbody>
</table>

In practice, however, while the provinces were excluded from actual negotiations, they were extensively consulted on specific issues (Ontario on the automotive sector, Alberta on beef, for example). In addition, some issues, such as the diversity of cultural
expression, were not subject to formal negotiations, but were discussed as particular areas of interest to Quebec, for example.

During negotiations, provincial representatives sat in the room alongside Canadian negotiators. This was somewhat awkward, given that two or three people represented the European Union while the Canadian delegation numbered between 20 and 30. The provinces could not intervene directly during the actual negotiations, but could pass notes to Canadian negotiators. They were also able to request a pause in negotiations to allow Canadian negotiators to arrive at a position that satisfied all concerns. Provincial participation was therefore limited during formal negotiating sessions: provincial officials were only able to speak if invited to do so by a federal representative. In addition, provincial officials were not consulted during final arbitration.

Throughout the negotiations, provincial representatives maintained informal relations not only with Canadian negotiators, but also with European negotiators. The chief negotiator of the Government of Québec, Pierre Marc Johnson, for example, had over 12 bilateral meetings with the chief EU negotiator, Mauro Petriccione (Johnson, Muzzi and Bastien, 2015: 30). At a January 2010 session in Brussels, the Canadian delegation numbered 50 people, including 28 representatives from all Canadian provinces.

During the process, Canada's chief negotiator, Steve Verheul, repeatedly recognized the invaluable contribution of the provinces, and notably of Quebec. Quebec greatly influenced negotiations on certification issues, labour mobility, and recognition of the diversity of cultural expressions. Thus, the role of the provinces became increasingly important, and even, in the opinion of the European negotiators, had a decisive impact on the success of the negotiations. Without a clear commitment from the most important provinces, the chances of concluding this agreement would have been very low.

The important role of the provinces, and of Quebec in particular, has been recognized and encouraged by the federal government of Justin Trudeau. The Quebec premier was even invited to travel to Belgium alongside the Canadian Prime Minister for the formal signing of the agreement. The Government of Canada also coordinated with Pierre Marc Johnson to convince the French and Walloon MPs not to block the process. Pierre Marc Johnson met with members who were against the agreement in Quebec and abroad, and continues discussions to assist with its implementation. No other province has played that role or made efforts regarding the implementation of CETA. Pierre Marc Johnson has provided follow-up to negotiations, reporting progress at both provincial and federal levels. He has also produced strategic position papers that are distributed within the Canadian government.

VI - The Trans-Pacific Partnership

The Trans-Pacific Partnership negotiations proceeded differently. Canada only joined the TPP negotiations in 2012, nearly four years after they had began. It was not the only latecomer: negotiations started among five countries in 2008, and ended in 2015 with 12 around the table.

For this reason, the set-up (scoping exercise) and especially the drafting of the negotiating mandate, took place in a very different context. In contrast with CETA, countries participating in TPP negotiations never broached the question of provincial involvement. Indeed, Canada joined
negotiations as a defensive move, to ensure that such an agreement was not concluded without it; this contrasts with the proactive role that Canada had played in both NAFTA and CETA.

When we compare negotiations of the Canada-United States FTA, CETA and the TPP, many similarities appear between the features of the CUSFTA and TPP negotiations (see Table 2). CETA stands as a case apart. According to a representative of the Government of Quebec who was close to events, the active participation of the provinces in CETA was not duplicated in the TPP and is not anticipated for future negotiations.10

Table 2: Summary of provincial roles in trade negotiations

<table>
<thead>
<tr>
<th>Provinces' roles</th>
<th>Canada-US FTA</th>
<th>CETA</th>
<th>PPT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Definition of the mandate</td>
<td>federal only</td>
<td>in consultation with provinces</td>
<td>federal only</td>
</tr>
<tr>
<td>Selection of Chief Negotiator</td>
<td>federal only</td>
<td>federal only</td>
<td>federal only</td>
</tr>
<tr>
<td>Selection of heads of negotiating tables</td>
<td>federal only</td>
<td>federal only</td>
<td>federal only</td>
</tr>
<tr>
<td>Provincial presence at the negotiating table</td>
<td>no</td>
<td>yes, but with limitations</td>
<td>no</td>
</tr>
<tr>
<td>Mechanisms for federal-provincial consultation</td>
<td>Premiers Conferences (14 meetings between the premiers and the Prime Minister of Canada); Committee on Trade Negotiations</td>
<td>C-Commerce Forum (C-Trade Meeting)</td>
<td>C-Commerce Forum (C-Trade Meeting)</td>
</tr>
<tr>
<td>Effect on provincial jurisdiction</td>
<td>minor</td>
<td>very important</td>
<td>minor</td>
</tr>
<tr>
<td>Approval mechanism</td>
<td>no</td>
<td>Approval by Parliament of Quebec, but not other provinces</td>
<td>Approval of the Parliament of Quebec, but not in other provinces</td>
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Under the TPP, the provinces were not consulted on either the definition of the negotiating mandate, the selection of the chief negotiator, the heads of the negotiating tables, or discussion topics. The provinces did not have access to the negotiating table and federal-provincial consultation was restricted to the C-Trade Committee. In contrast to trade negotiations between Canada and the United States, no meeting between the Prime Minister and the premiers took place.

As in the Canada-United States FTA, the preferred mechanism to inform provincial representatives was the C-Trade Committee. Some meetings of the C-Trade Committee focused on specific issues such as public procurement, environment and agriculture. According to a representative of the Government of Quebec, the level of intervention by the provinces during these meetings was limited. In addition, during the round of negotiation, a specific briefing for the provinces was offered quite late in the day. According to one provincial representative, the mechanism was rather unidirectional. A representative of the federal government highlighted, however, that the C-Trade Committees are currently much better organized and more routinized.
practices than before. Federal officials seem to consider that these meetings have optimized provincial participation.

According to a representative of the Government of Quebec, no province appointed a chief negotiator for the TPP. Instead, the provinces were represented by a high level public administrator. The Government of Quebec adopted a two-prong strategy. The first involved having a physical presence at the scene of negotiations in order to attend debriefing sessions, but also to communicate the government's positions and address certain aspects of the text. Secondly, the Government of Quebec regularly transmitted its own positions, defensive and offensive, along with comments on available texts and Canada's negotiating positions. However, according to a representative of the Quebec government, while during CETA discussions the federal government shared negotiating texts and instructions with the provinces, this practice was not continued during TPP negotiations, where texts were often released to the provinces at the last minute. Comments were requested, but no real reaction was permitted and there was too little time for analysis. Another representative of the Quebec government confirmed that the model employed during CETA was not used in TPP negotiations. According to him, things were done in a very different way, with texts sent at the last minute for comment and no real real opportunity to participate. A similar approach was employed in briefings following each round of negotiations on site and in meetings of the C-Trade Committee.

Another representative of the Government of Quebec saw things somewhat differently. This person specified that there was significant provincial participation in TPP negotiations because of the work that had been done under CETA. The work accomplished by the provinces during CETA negotiations was used in the TPP, but without allowing provinces a similarly important level of actual participation.

According to a representative of the Government of Quebec, the provinces did not exercise the same type of leadership in TPP negotiations as they had in CETA. He attributes this to the absence of a clear policy initiative in the Quebec government, explained in part by the departure of Jean Charest as Premier of Quebec. His successors had neither the same level of interest nor the influence and political connections needed (Jeyabalaratnam and Paquin 2016).

Informal coordination between federal and provincial representatives was observed during TPP negotiations. For example, during a negotiating session in Atlanta in October 2015, Quebec Ministers Daoust and Paradis wrote to their federal counterparts to ensure coordination during meetings, knowing that agriculture, a delicate subject for Canada, would be discussed. Provincial representatives were also present in rounds held in Singapore and Hawaii.

**Conclusion**

Provincial participation in Canada's trade negotiations is a progressive phenomenon, which dates back to the 1970s. The same trend is evident in provincial participation in international negotiations on issues that fall under provincial jurisdiction. While inclusion of the provinces within the Canadian delegation at negotiations of the next-generation free trade agreement between Canada and the European Union is an important precedent, it is difficult to see this as a fundamental change as this model was not reproduced in later trade negotiations.
During CETA negotiations, the Government of Canada also concluded an agreement with the United States on the issue of "Buy America", which touched on procurement of American States. It also initiated trade talks with India, concluded a trade agreement with South Korea and joined the TPP negotiations. In none of these negotiations was the CETA model of provincial involvement employed. Provincial participation was minimal in the agreement with the United States. The Indian government refused to allow federated States to be involved in negotiations, likely for domestic political reasons. As one federal official familiar with the matter stated, "the conversation on this topic was short with the Indians". A similar situation arose in negotiations with South Korea and in the TPP. In each case, it was through federal-provincial mechanisms that provinces were informed of the progress of discussions.

If the Canadian government had wanted to radically transform Canadian federalism and the practice of trade negotiations in order to give more room to the provinces, it likely would have chosen to negotiate a comprehensive framework agreement on provincial participation in trade negotiations. This was not the case. Canadian government officials argue, however, that the C-Trade Committee has become more effective and that the federal-provincial collaboration can work well without altering institutions. It will be interesting to follow the evolution of provincial participation in the upcoming negotiation of free trade agreements.
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